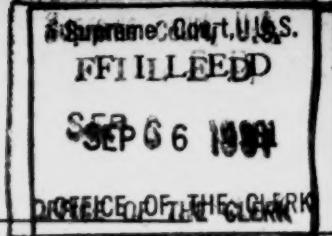


(2)
No. 91-220



In The
Supreme Court of the United States
October Term, 1991

DAVID BARLETTA,

Petitioner,

v.

RONALD J. VACCA,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
First Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Ann Marie Monzione*
Ronald E. Harding
Weston, Patrick,
Willard & Redding
84 State Street
Boston, MA 02109
(617) 742-9310

Counsel for Respondent

*Counsel of Record

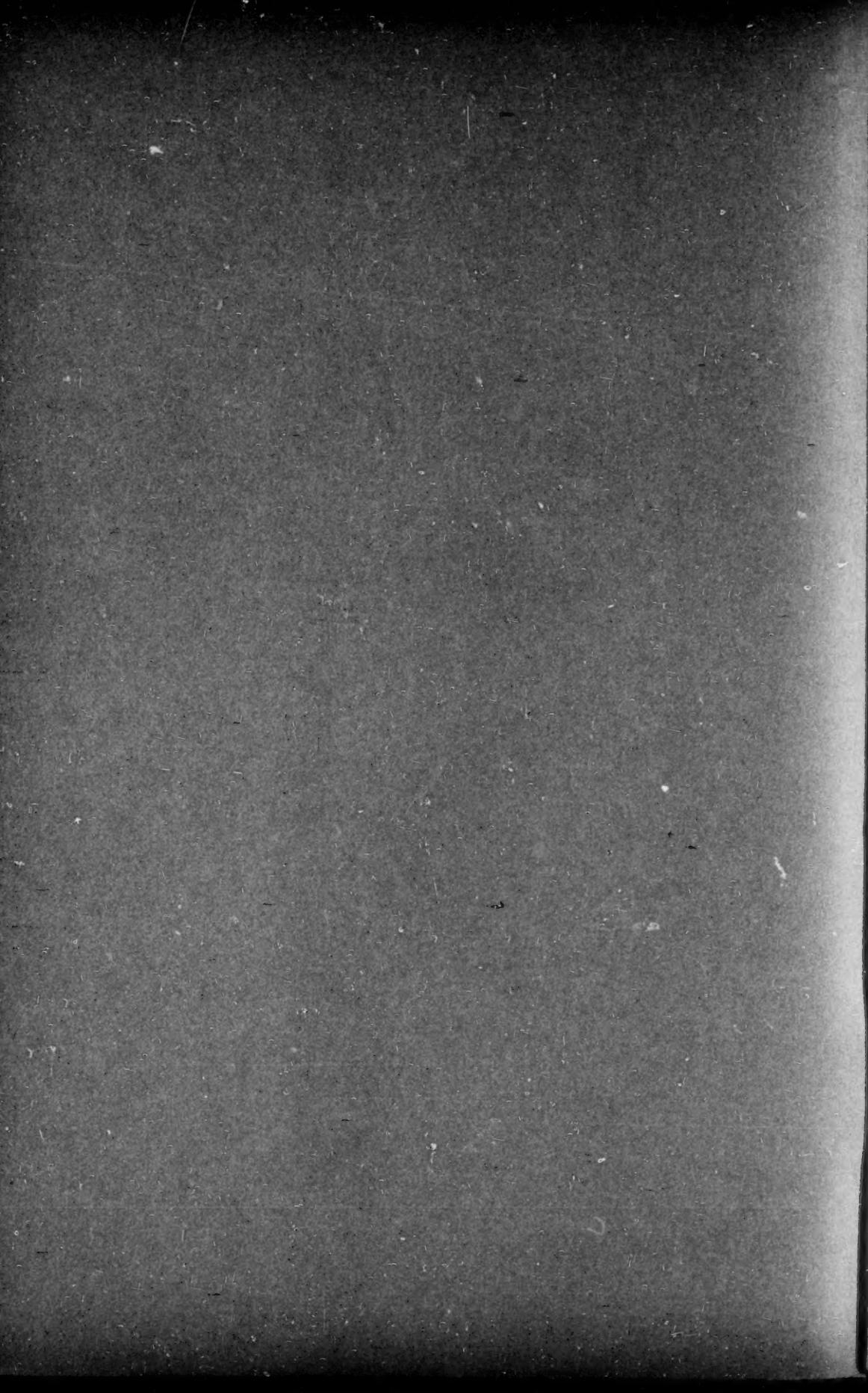


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**RESPONDENT'S BRIEF IN OPPOSITION TO
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Respondent Ronald J. Vacca opposes the petition of David Barletta for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. In opposition to David Barletta's petition, respondent files this brief.

STATUTORY PROVISIONS AND RULES

In addition to those statutory provisions and rules listed in Petitioner's Brief, the Respondent adds the following:

U.S. CONSTITUTIONAL AMENDMENT IV:

- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and siezures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SUMMARY OF ARGUMENT

The First Circuit committed no error in denying absolute immunity to Peti-

titioner David Barletta ("Barletta") as Barletta was not engaged in activity which could even vaguely be considered legislative in nature. Despite Barletta's representations to the contrary, the School Committee was not considering budgetary issues at the time relevant to this matter. Further, Barletta is not entitled as a matter of law to absolute immunity, as he is a local official to whom such status does not extend in this jurisdiction.

Neither did the First Circuit commit any error in deferring to the jury for a factual analysis of this case. Although a determination of qualified immunity is usually a matter of law, this Court has acknowledged and allowed for the possibility that in unique cases, such as

the case at bar, a factual analysis is essential for a just application of said immunity.

STATEMENT OF THE CASE

Respondent Ronald J. Vacca ("Vacca") takes exception to certain misstatements of the facts made in Petitioner David Barletta's ("Barletta") Statement of the Case as presented in his Petition for Writ of Certiorari. Vacca addresses said misstatements pursuant to Rule 15.1 of the Supreme Court Rules.

Barletta has stated that Vacca interrupted the School Committee Meeting by making accusations of lying toward the Superintendent. (Barletta's Petition for Writ of Certiorari, p.4.) Vacca in fact was not interrupting said meeting, but had been given the floor by acting

Chairman Barletta and was thus authorized to speak, including questioning of the Superintendent. Further, Vacca was attempting to question the Superintendent about contradictions alleged by Vacca to have been made by the Superintendent earlier in the year. The only budgetary issues being raised at this meeting were between Vacca and the Superintendent. The Committee as a whole was not considering budgetary concerns as alleged by Barletta in his brief. The entire Committee was only to consider and vote on various persons for teaching positions. There is further factual dispute over the actions of Vacca and the Superintendent in response to the actions of Barletta. Vacca does not agree with Barletta's description of the respective behavior of Vacca and the Superintendent.

Vacca does not concede, as stated by Barletta, that he persisted in any behavior after a valid request to cease. Whether Barletta actually attempted in a proper manner to control the meeting is also in dispute. It is Vacca's position that Barletta did not give fair and proper warning to Vacca that he intended to have Vacca physically removed and restrained for validly expressing his concerns.

ARGUMENT

THE FIRST CIRCUIT COURT OF APPEALS WAS CORRECT IN DETERMINING THAT BARLETTA WAS NOT ENGAGED IN LEGISLATIVE ACTIVITY AND WAS NOT OTHERWISE ENTITLED TO ABSOLUTE IMMUNITY

The issue before the Court is not whether Barletta, the acting Everett School Committee Chairman, might be entitled to absolute immunity for his actions on the evening of August 29,

1988, but whether the District Court of Appeals was correct in denying absolute immunity status to Barletta.

The Courts below correctly determine that absolute immunity status is granted only to individuals acting in a legislative capacity. Thus, the first level of inquiry by these Courts was whether Barletta was functioning in a legislative or administrative capacity on the evening of August 29, 1988. In rendering its decision, the District Court, Skinner, D.J., reviewed the record before it and applied the two prong test established for this Circuit by the Court of Appeals in Cutting v. Muzsey, 724 F.2d 259, 261 (1st Cir. 1984). The analysis established by the Cutting Court involved a determination that the action being

taken either established a general policy (legislative) or singled out specific individuals and affected them differently from others (administrative). Cutting, 724 F.2d at 261. This test was established for the very situation which presented itself in this case.

The lower courts, in reviewing the underlying facts surrounding Barletta's actions, determined that the decision taking place at the time of Vacca's removal from the Committee involved the rehiring of seven specific individuals as teachers. (App. 3, 16.) Although a discussion arose between Vacca and the Superintendent about budgetary concerns, the issue presented for vote by the School Committee members was the hiring of seven individuals, one by one. Thus, the test established by the First

Circuit in Cutting, that "...the facts used in the decision making are more specific, such as those that relate to particular individuals or situations..." was clearly met, rendering the decision of the committee and its chair at the time in question an administrative one; this action "single[d] out specifiable individuals and affect[ed] them differently from others." Cutting, 724 F.2d at 261.

The lower Courts were undeniably correct in applying the Cutting test and determining in conjunction with the record before them, that Barletta was not engaged in activity that even faintly resembled legislation. Even if Barletta were involved in legislative activity at the time in question, the Lower Courts were still within their power to deny

absolute immunity to him as a matter of law, as Barletta was not unequivocally entitled to absolute immunity no matter what activities he was engaged in.

The District Court and the First Circuit correctly recognized that this Court has not mandated the application of absolute immunity to local officials.

Tenny v. Brandhove, 341 U.S. 367 (1951).

Lake Country Estates, Inc., v. Tahoe Regional Planning Agency, 440, U.S. 391 (1979). Indeed, Barletta concedes this point in his argument. (Petition for Writ of Certiorari, p.7.) Even though various Appellate Courts have extended absolute immunity to local officials acting in a legislative capacity, the First Circuit has not yet addressed this issue fully and therefore there was no mandate placed upon the District Court or the First

Circuit to grant such immunity to Barletta as a matter of law. Thus, these Courts neither flew in the face of existing law nor committed any error in refusing to grant such status to Barletta. Therefore, there was no clear error committed by the lower Courts in determining that Barletta was not entitled to absolute immunity as a matter of fact or as a matter of law.

THE FIRST CIRCUIT COMMITTED NO ERROR OF LAW IN DEFERRING TO THE JURY FOR THE FACTUAL GROUNDWORK NECESSARY IN DETERMINING THE APPLICATION OF QUALIFIED IMMUNITY TO THIS CASE.

The First Circuit and the District Court before it has committed no error of law in deferring to the jury's unique capabilities to establish a groundwork for legal analysis of qualified immunity in the case at hand. This Court, apparently foreseeing the difficulty of an

absolute standard of law, has left the door open for lower Courts to find that qualified immunity is both a matter of law and fact in some instances. In the precedent setting case of Harlow v. Fitzgerald, 457, U.S. 800 (1982), the Court held that "... bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." Harlow, 457 U.S. at 817-818. Thus, the Court decided that ideally "... [r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many unsubstantiated claims on summary judgment." Id., at 818. (emphasis added.)

However, the Court's use of the terms "should" and "many", supra, indicates a subtle avoidance of a mandate by this Court in an area in which cases do not always fit the mold established by Harlow. This subtlety is also apparent in the Court's statement that "... government officials performing discretionary functions, generally are shielded from liability for civil damages..." Id. (emphasis added.)

Inherent in this Court's choice of words, as shown above, is the recognition that cases could exist in which the government official's conduct cannot be objectively assessed as reasonable. Indeed, the case now before this Court is just such a case wherein the lower Courts have been unable to ascertain, as a matter of law, what the relevant legal

standards should be without a factual analysis of the circumstances of this case.

It has been determined by the District Court below that Vacca's Constitutional rights were indeed violated. The justification for said violation, as alleged by Barletta, is the proper application of a Massachusetts Statute, known as the "Open Meeting Law", to the circumstances of the case. The Open Meeting Law applies to persons creating a "disruption". In order to determine the validity of the Open Meeting Law's application to the situation at hand, that statute must be analyzed in conjunction with the forum in which the situation arose and the historical behavior of that forum. Such an analysis necessarily requires factual

evidence and an ultimate determination of the relevant facts necessary for a legal finding. Without such factual basis, the tests established by Harlow cannot even be applied, much less utilized to determine a legal finding of qualified immunity.

The District Court and the First Circuit have essentially indicated their inability to assess whether the Open Meeting Law excused Barletta's violation of Vacca's otherwise inviolable Constitutional Rights, as they are unable to assess the applicability of that statute without a factual analysis and determination of Vacca's behavior within the context of the Everett School Committee. In other words, a determination of whether an objectively reasonable public official in Barletta's position should

have considered Vacca a disruption to the Everett School Committee meeting involves an analysis of the historic character of these meetings and where Vacca's behavior fell within the spectrum of behavior common to those meetings. This factual analysis has been properly deferred to a jury by both the District Court and the First Circuit, which have both recognized their inability to assess behavior within a context for which they have no frame of reference.

The Lower Courts have correctly concluded that a determination of qualified immunity cannot be made in a vacuum. This case is peculiarly lacking a sufficient factual basis from which to conclude that qualified immunity is appropriate.

In light of the unique circumstances of this case and the obvious need for factual groundwork, as recognized by both the District Court and the First Circuit, it is apparent that no clear error of law has been committed by the First Circuit in deferring to the jury for an initial factual analysis. Further, this Court has not precluded such action by the lower Courts and has in fact subtly acknowledged that the standard set in Harlow could not include every possible case brought before the judiciary.

CONCLUSION

For the reasons stated herein,
Respondent Ronald J. Vacca requests that
this Court deny David Barletta's Petition
for Writ of Certiorari.

Respectfully Submitted,
Counsel for Respondent

Ann Marie Monzine*
Ronald E. Harding
Weston, Patrick, Willard &
Redding
84 State Street
Boston, MA 02109
(617) 742-9310

*Counsel of Record

